IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 13/02**

In the matter between:

MARIA SITHOLE Applicant

And

HAPPY VALLEY ENTERPRISES (PTY) LTD
T/A HAPPY VALLEY MOTEL Respondent

Neutral citation: *Maria Sithole v Happy Valley Enterprises (Pty) Ltd (13/02) [2018] SZIC 19 (March 20, 2018)*

Coram: N. Nkonyane, J
(Sitting with G. Ndzinisa and S. Mvubu
Nominated Members of the Court)

Heard submissions: **19/03/18**

Delivered judgement: **20/03/18**

SUMMARY---Labour Law---Applicant dismissed summarily by the Respondent without any disciplinary hearing---Respondent failing to lead evidence in rebuttal---Applicant's evidence remaining unchallenged---Burden of proof in terms of Section 42 of the Employment Act.

Burden of proof on the employee---To prove that she was an employee to whom Section 35 of the Employment Act applied.

Burden of proof on the employer---To prove that the termination was one permitted by Section 36 of the Employment Act and that taking into account all the circumstances of the case it was reasonable to dismiss the employee

---

JUDGEMENT

---

1. This is an application for determination of an unresolved dispute instituted by the Applicant against the Respondent in terms of Section 85 (2) of the **Industrial Relations Act No.1 of 2000** as amended.

2. The Applicant is an adult Swazi female of Nkwalini, in the Hhohho District.

3. The Respondent is a company that is involved in the hospitality industry which is duly registered in terms of the Companies Law of the Kingdom of Swaziland having its place of business at Ezulwini Valley, in the Hhohho District.

4. The Applicant was employed by the Respondent as a Cleaner on 08th August 1979. The Applicant remained in continuous employment until her services were terminated by the Respondent on 30th June 2001. The Applicant claims that the termination of her services by the Respondent was unlawful and unfair.

5. The Applicant stated in paragraph 5 of her particulars of claim that her dismissal by the Respondent was unlawful, unfair and unreasonable in that she did not commit any offence at her place of employment warranting the dismissal. She further stated that she was never given a hearing to defend herself.

6. The Applicant is therefore claiming payment of additional notice, severance allowance and maximum compensation for the unfair dismissal.

7. The Respondent denied the Applicant's claims. In its Reply the Respondent stated that the Applicant was lawfully dismissed pursuant to a disciplinary hearing in which the Applicant was facing charges of theft of money belonging to a guest and that she confessed to the charges.

8. According to the pleadings before the Court, the matter was enrolled on 21st January 2002. The matter was finally heard in Court on 19th March 2018, sixteen years later. The matter was allocated two trial dates in the current Court Session being 05th and 06th March 2018. The trial did not proceed as the parties informed the Court that they

were engaged in negotiations with the intention to have the matter settled out of Court. It was accordingly postponed until 13th March 2018 pending finalization of the negotiations.

9. When the matter appeared before the Court again on 13th March 2018, the parties informed the Court that the negotiations were not successful as the process failed to commence at all. The Court allocated the matter 19th March 2018 as the date for the resumption of trial.

10. When the matter was called on the 19th March 2018, the Respondent's attorney informed the Court that the Respondent was not going to lead any witness to rebut the evidence of the Applicant.

11. Accordingly, only one witness testified before the Court, that is, the Applicant and her evidence was not challenged.

12. Under oath, the Applicant told the Court that she was employed by the Respondent as a Cleaner in 1979. Her main duty was to clean the hotel rooms. She told the Court that one morning she entered a certain room where she found two male guests of European race and two females of the African race. When she cleaned the room she found five Kwacha and one Dollar. She did not specify whether it was a Malawian or Zambian Kwacha. After the Applicant had finished cleaning the room, the two male guests came back and the Applicant gave them the money that she had found in the room. The Applicant told the Court that the two guests told her that there was

E200:00 missing. The Applicant told them that she did not find that amount of money in the room and also enquired from the two guests if they did ask from their female companions about the money.

13. The two guests went to report the matter at the reception desk. The Applicant was thereafter called by the Receptionist Manager, a certain Mr. Tsabedze who told applicant upon arrival that she appeared guilty and asked her to sign a warning document. The Applicant refused to sign the document. Another Manager of the Respondent, Mr. Nobert Smith, told the Applicant to go home. The Applicant was thus relieved of her duties at the Respondent's establishment on that day.

14. As already pointed out herein, the evidence of the Applicant was not challenged either by cross examination or by the leading of evidence in rebuttal.

15. The Applicant was therefore able to prove that the Respondent terminated her services unlawfully, and that when her services were terminated, she was an employee to whom Section 35 of the **Employment Act** applied. (See: **Section 42 (1) of the Employment Act**.)

16. The Applicant having testified before the Court that she was unlawfully terminated by the Respondent, the burden of proof shifted to the Respondent to prove on a balance of probabilities that the

reason for the termination was one permitted by Section 36 of the Employment Act, and that taking into account all the circumstances of the case, it was reasonable to terminate the service of the Applicant. (See: **Section 42 (2) (a) and (b) of the Employment Act.)** The Respondent clearly failed to discharge that burden as it did not lead any evidence before the Court.

17. Taking into account all the evidence of the Applicant before the Court, there being no evidence led by the Respondent to rebut the Applicant's evidence, the Court will come to the conclusion that the termination of the Applicant's services by the Respondent was unlawful, unfair and unreasonable. The Applicant's application therefore ought to succeed.

18. **RELIEF:-**

There was no evidence led before the Court to challenge the relief claimed by the Applicant. The Applicant was dismissed by the Respondent in 2001. She has had to wait for more than sixteen years to have her day in Court. She told the Court that she is now sixty five years old. She also told the Court that since her unlawful dismissal in 2001, she has not been able to find alternative employment. In the circumstances of this case, the Court's view is that compensation equivalent to twelve months' salary would be appropriate, fair and just.

19. The Applicant did not apply for an order for costs of suit in her papers. The Applicant's attorney however applied for costs of suit to

be granted in favour of the Applicant. The application was opposed by the Respondent's attorney who argued before the Court that the Respondent should not be burdened with an order for costs as the Respondent did not waist the Court's time. It did not cross examine the Applicant or lead any witness in rebuttal.

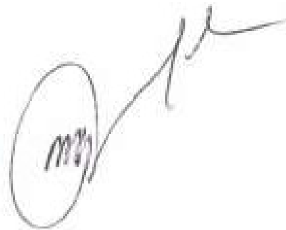
20. The evidence before the Court revealed that the matter changed various hands, both by the Applicant and the Respondent. The Respondent was first represented by Robinson Bertram, thereafter it was SS Mnisi Attorneys, and lastly, the current attorneys who came into the picture in 2017.

21. The Respondent's attorney indicated when the trial resumed that the Respondent will not lead any witness. The Respondent did not, therefore, waste the Court's time when it became apparent that it did have the necessary evidence to rebut the Applicant's case. The Respondent should be commended for its gesture as the Court's time was saved. The Respondent however made this decision very late taking into account that it joined in the matter on 07th November 2017. Even if that be case, the Court's practice is that the party who saves the Court's time should be commended for that. Taking into account all the evidence before the Court, the Court will make the following order;

    a) *The Respondent is to pay the Applicant the amount for **E16, 175.46** as prayed for in paragraph 8 of the Applicant's particulars of claim.*

b) The Respondent is to pay half the costs of suit.

22. The members are in agreement.



N.NKONYANE

JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

For Applicant : Mr. B.S. Dlamini
(Attorney at B.S Dlamini & Associates)

For Respondent : Mr. S. Dlamini
(Attorney at S.V. Mdladla and Associates)